No. 19-5457

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW G. MUNKSGARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the trial evidence was sufficient to establish that the bank to which petitioner submitted a fraudulent loan application was federally insured at the time of the fraud.

2. Whether petitioner "use[d], without lawful authority, a means of identification of another person," within the meaning of 18 U.S.C. 1028A(a)(1), when he forged another person's signature on a contract that he submitted to a federally insured bank in support of a loan application.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Fla.):

United States v. Munksgard, No. 15-cr-12 (Dec. 21, 2016)

United States Court of Appeals (11th Cir.):

United States v. Munksgard, No. 16-17654 (Jan. 30, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A32)[1] is reported at 913 F.3d 1327. The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2019. A petition for rehearing was denied on May 2, 2019 (Pet.

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[1] Appendix A to the petition for a writ of certiorari contains an unpaginated transmittal memorandum from the clerk of the court of appeals to the parties, which accompanied that court's decision. For clarity, this brief treats Appendix A as if it were separately paginated beginning on the first page of the court of appeals' opinion (i.e., with page 1 of the opinion as Pet. App. A1).

App. B1). The petition for a writ of certiorari was filed on July 30, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted on four counts of making false statements on a loan application, in violation of 18 U.S.C. 1014, and one count of aggravated identity theft, in violation of 18 U.S.C. 1028A. Judgment 1. Petitioner was sentenced to 30 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. A1-A32.

1. In 2013, petitioner, a land surveyor, applied for a line of credit with Drummond Community Bank, a federally insured bank operating in west central Florida, to finance his land-surveying business. Pet. App. A3-A4. In support of his loan application, petitioner submitted a purported contract between him and a company named Cal-Maine Foods. Ibid. The contract bore the signature of Kyle Morris, a Cal-Maine Foods employee. Id. at A4. In fact, as petitioner later admitted, the contract was fraudulent, and petitioner had signed Morris's name without Morris's knowledge or permission. Ibid.

Between 2013 and 2014, petitioner obtained three more lines of credit from Drummond Bank. Pet. App. A4. In each instance, petitioner submitted a fraudulent contract in support of his loan

application. Ibid. The entities identified in the contracts, however, had no knowledge of the agreements, and the contracts were signed in the names of fictitious employees. Ibid.

2. In May 2015, a grand jury in the Northern District of Florida returned an indictment charging petitioner with four counts of making false statements on a loan application to a federally insured financial institution, in violation of 18 U.S.C. 1014, based on petitioner's four fraudulent loan applications to Drummond Bank; and one count of aggravated identity theft, in violation of 18 U.S.C. 1028A, based on petitioner's unauthorized use of Morris's name and signature on the forged Cal-Maine Foods contract. Indictment 1-3.

During petitioner's jury trial, the government introduced three pieces of evidence to show, as required by 18 U.S.C. 1014, that Drummond Bank was federally insured at the time of petitioner's false applications. Pet. App. A5. First, the government introduced a certificate issued to Drummond Bank by the Federal Deposit Insurance Corporation (FDIC) in 1990, which showed that the bank's deposits were FDIC-insured when the bank was initially chartered in 1990. Ibid.; Gov't C.A. Br. 5; 9/13/2016 Trial Tr. 155. Second, Drummond Bank's vice president and chief underwriter, David Claussen, testified that the bank was FDIC-insured at the time of trial in 2016. 9/13/2016 Trial Tr. 153-154, 158-159; see Pet. App. A5; Gov't C.A. Br. 5. Third, Claussen, who had worked at Drummond Bank for 25 years, additionally testified

that the bank's FDIC certificate is not periodically renewed. 9/13/2016 Trial Tr. 153, 158; Pet. App. A5; Gov't C.A. Br. 5.

At the close of the evidence, petitioner moved for a judgment of acquittal on all counts. 9/13/2016 Trial Tr. 341. With respect to the false-loan-application counts, petitioner argued that the trial evidence was insufficient to establish that Drummond Bank was federally insured at the time of petitioner's offenses in 2013 and 2014. Id. at 345-346. With respect to the aggravated-identity-theft count, petitioner argued that he did not "use[]" Morris's name within the meaning of 18 U.S.C. 1028A. 9/13/2016 Trial Tr. 356-357. The district court rejected petitioner's contentions and denied the motion. Id. at 353-356, 368-370.

The jury found petitioner guilty on all counts. Pet. App. A5. The district court sentenced petitioner to 30 months of imprisonment, consisting of concurrent six-month terms of imprisonment on each of the false-loan-application counts, and a statutorily mandated consecutive 24-month term of imprisonment on the aggravated-identity-theft count. Judgment 3; see 18 U.S.C. 1028A(a)(1).

3. The court of appeals affirmed. Pet. App. A1-A32. On appeal, petitioner renewed his contentions that the evidence was insufficient to show that Drummond Bank was federally insured as required by 18 U.S.C. 1014 and that he did not "use[]" Morris's name within the meaning of 18 U.S.C. 1028A. Pet. App. A2-A3. The court of appeals rejected both contentions. Id. at A1-A17.

a. The court of appeals found that "[t]he government's evidence of insurance, while not overwhelming, was sufficient to prove beyond a reasonable doubt that Drummond Community Bank was FDIC-insured" at the time of petitioner's false loan applications. Pet. App. A8. It observed that, under circuit precedent, "at least in some circumstances, evidence of either 'prior' or 'subsequent' insurance, even standing alone, can be adequate proof of coverage at the time of the offense." Id. at A9; see id. at A8-A9 (citing Cook v. United States, 320 F.2d 258, 259 (5th Cir. 1963).[2] And it reasoned that the 1990 FDIC certificate provided "evidence * * * of 'prior existence'" of insurance coverage; that Claussen's testimony that Drummond Bank was insured in 2016 provided evidence of "'subsequent existence'" of such coverage; and that Claussen's testimony that the bank's FDIC certificate is not periodically renewed "provide[d] additional evidence -- beyond mere prior and subsequent existence -- that Drummond [Bank] was insured in 2013 and 2014," particularly given that Claussen "had spent 25 years at the small bank[] and was therefore likely to be familiar with its administration and operations." Id. at A10.

The court of appeals determined that this evidence -- "[c]oupled with the 'universal presumption * * * that all banks are federally insured,'" and "viewing the proof in the light most

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[2] Fifth Circuit decisions issued prior to October 1, 1981, are binding precedent in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

favorable to the government" -- sufficiently supported the jury's finding that "Drummond [Bank] was insured by the FDIC on the dates of [petitioner's] offenses." Pet. App. A10-A11 (quoting United States v. Maner, 611 F.2d 107, 110 (5th Cir. 1980)). The court clarified that, by referring to a "'universal presumption * * * that all banks are federally insured,'" it did not mean that it "t[ook] official notice of a disputed fact," but instead merely "acknowledge[d] the state of the world -- an exercise that is necessarily part of any review of the reasonableness of a jury's decision." Id. at A10 & n.4 (citation omitted). At the same time, the court issued a "warning to federal prosecutors" to "do better" in future cases and to avoid this "irritatingly familiar" issue by submitting more conclusive evidence that a bank is federally insured. Id. at A2.

b. The court of appeals also rejected petitioner's separate contention that Section 1028A's prohibition on "us[ing]" the means of identification of another without lawful authority is limited to "impersonat[ing] [the victim] or otherwise act[ing] on his behalf." Pet. App. A12 (citation omitted). The court "f[ound] [it]self in agreement" with the Sixth Circuit's recent decision in United States v. Michael, 882 F.3d 624 (2018), which "held that a pharmacist had 'used' a doctor's and patient's 'means of identification' -- even though he impersonated neither -- when he included the doctor's National Provider Identifier and the

patient's name and birthdate on a fraudulent insurance claim." Pet. App. A12.

The court of appeals cited three principal reasons supporting that determination. Pet. App. A12-A16. First, the court observed that the plain meaning of the verb "use" is "to convert [an object] to one's service; to avail oneself of it; or to employ it." Id. at A13 (brackets and citation omitted). Because petitioner "'employed' Morris's name in order to procure a bank loan, and thereby 'convert[ed]' Morris's name 'to [his] service,'" his conduct came within that plain meaning. Ibid. (brackets in original).

Second, the court of appeals found that confining Section 1028A to impersonations would contravene the "[s]tatutory context." Pet. App. A14. The court explained that Section 1028A "criminalizes the knowing and unauthorized use of a means of identification 'during and in relation to' certain enumerated felonies," and that the "'during and in relation to' language connotes causation" of the predicate felonies. Ibid. (citation omitted). In this case, the court explained, "forging Morris's name to bolster [petitioner's] loan application facilitated" the bank fraud. Ibid.

Third, the court of appeals observed that, in prior decisions addressing other criminal statutes, this Court and others have similarly "found the word 'use' * * * to entail employing or converting an object to one's service." Pet. App. A15 (citing,

inter alia, United States v. Castleman, 572 U.S. 157, 170-171 (2014) ("[T]he word 'use' [in 18 U.S.C. 922(g)(9)] conveys the idea that the thing used * * * has been made the user's instrument." (citation omitted))).

The court of appeals explained that it is irrelevant that petitioner did "not take anything from Morris nor did he obligate Morris to do anything." Pet. App. A16. "[H]arm to the identity's true owner," the court observed, "isn't an element of § 1028A(a)(1)." Ibid. The court also rejected (ibid.) petitioner's assertion that, according to him, his use of Morris's means of identification did not influence the bank's decision to approve the loan. "[R]eliance," the court explained, is not required under Section 1028A(a)(1). Ibid.

c. Judge Tjoflat dissented, on the view that the evidence was insufficient to support the jury's finding that the bank was FDIC-insured, see Pet. App. A18-A32. He did not express any disagreement with the court's interpretation of the term "use[]" in the aggravated-identity-theft statute.

ARGUMENT

Petitioner contends (Pet. 7-10) that the trial evidence was insufficient to establish that the bank to which he repeatedly submitted fraudulent loan applications was federally insured. Petitioner separately contends (Pet. 10-14) that his use of the name and forged signature of another person on the contract that he submitted to the bank did not constitute a "use[], without

lawful authority, [of the] means of identification of another person" within the meaning of 18 U.S.C. 1028A(a)(1). The court of appeals correctly rejected both contentions, and its decision does not conflict with any decision of this Court or of any other court of appeals. This Court has repeatedly denied petitions for writs of certiorari presenting arguments similar to both of petitioner's contentions in this case. See Ayewoh v. United States, 565 U.S. 836 (2011) (No. 10-10422) (sufficiency of evidence that bank is federally insured); Hall v. United States, 562 U.S. 1223 (2011) (No. 10-6878) (same); El-Ghazali v. United States, 549 U.S. 1055 (2006) (No. 06-5616) (same); Smith v. United States, 525 U.S. 1020 (1998) (No. 98-5053) (same); Warren v. United States, 519 U.S. 831 (1996) (No. 95-8905) (same); Gatwas v. United States, 140 S. Ct. 149 (2019) (No. 18-9019) (meaning of "use" in 18 U.S.C. 1082A(a)(1)); Bercovich v. United States, 136 S. Ct. 799 (2016) (No. 15-370) (same); Otuya v. United States, 571 U.S. 1205 (2014) (No. 13-6874) (same). The same result is warranted here.

1. The court of appeals correctly determined that the trial evidence was sufficient to establish that Drummond Bank was federally insured at the time of petitioner's false loan applications in 2013 and 2014. Pet. App. A5-A11. That factbound determination does not warrant further review.

a. "[E]vidence is sufficient to support a conviction if, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt.'" Coleman v. Johnson, 566 U.S. 650, 654 (2012) (per curiam) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). To prevail on his contention that the evidence of Drummond Bank's FDIC-insured status was insufficient to support the jury's guilty verdict on the false-loan-application counts under 18 U.S.C. 1014, petitioner accordingly bore the burden of demonstrating that, viewing the evidence in the light most favorable to the government, no rational factfinder could have found that fact beyond a reasonable doubt. The court of appeals correctly found that petitioner cannot satisfy that standard.

As the court of appeals observed, the trial evidence here included a showing of FDIC coverage both before and after petitioner's crime, plus evidence suggesting that no change occurred in between. Pet. App. A10. An FDIC certificate from the time Drummond Bank was initially chartered in 1990 showed the bank's prior insured status, and testimony that the bank was insured at the time of trial in 2016 showed its subsequent insured status. Ibid. In addition, testimony of the bank's chief underwriter -- "who had spent 25 years at the small bank, and was therefore likely to be familiar with [the bank's] administration and operations" -- showed that the bank's insured status was not "renewed 'every so often.'" Ibid. The court found that the evidence, taken together, sufficed to enable a reasonable jury to

find that the bank was insured at the time of petitioner's 2013 and 2014 offenses. Ibid.

That finding accords with the decisions reached by many courts that have determined that, when the government simply establishes that a bank is FDIC-insured at the time of trial, the jury has a sufficient basis to conclude that the bank was insured at the time the charged offense took place, provided the two times are relatively close together. See, e.g., United States v. Ware, 416 F.3d 1118, 1121-1123 (9th Cir. 2005); United States v. Lewis, 260 F.3d 855, 855-856 (8th Cir. 2001) (same), cert. denied, 534 U.S. 1154 (2002); United States v. Nnanyererugo, 39 F.3d 1205, 1208 (D.C. Cir. 1994) (per curiam) (same), cert. denied, 514 U.S. 1113 (1995); United States v. Sliker, 751 F.2d 477, 484 (2d Cir. 1984) (same), cert. denied, 470 U.S. 1058, and 471 U.S. 1137 (1985); United States v. Knop, 701 F.2d 670, 672-673 (7th Cir. 1983) (same); United States v. Safley, 408 F.2d 603, 605 (4th Cir.) (same), cert. denied, 395 U.S. 983 (1969); cf. United States v. Ali, 266 F.3d 1242, 1244 & n.3 (9th Cir. 2001) (finding that an FDIC certificate that antedated the offense by "more than a decade," combined with testimony that the bank was insured at the time of trial, was insufficient to show that the bank was FDIC-insured at the time of the offense). As noted above, the government had even more evidence than that here.

Petitioner contends (Pet. 8-9) that the court of appeals improperly applied a "'universal presumption'" that banks are

federally insured. In his view, such a presumption "reverse[s] * * * the presumption of innocence and excuses the government's burden of proof." Pet. 9. That contention is mistaken. The court appeals made clear that it was not "taking official notice of a disputed fact so much as acknowledging the state of the world -- an exercise that is necessarily part of any review of the reasonableness of a jury's decision." Pet. App. A10 n.4. The jury was not required to assume that banks in general, or this bank in particular, would have any significant likelihood of flitting in and out of FDIC coverage. In recognizing this, the court simply gave effect to the well-established principle that juries can "very properly exercise their own judgment and apply their own knowledge and experience in regard to the general subject of inquiry." Head v. Hargrave, 105 U.S. 45, 51 (1882) (citation omitted).

b. Petitioner contends (Pet. 8) that this case should be "controlled by" the Fifth Circuit's decision in United States v. Platenburg, 657 F.2d 797 (5th Cir. Unit A Oct. 1981). But petitioner does not identify any inconsistency between that decision and the decision below.

In Platenburg, the government did not present any evidence in its case in chief that the bank in question was insured by the FDIC. After the defendant moved for a judgment of acquittal, the district court allowed the government to reopen its case to introduce a certificate of insurance issued seven years before the

charged offenses. 657 F.2d at 798-800. Because the government had not presented a witness who could testify about the certificate or the bank's FDIC-insured status, the Fifth Circuit deemed the evidence insufficient, and reversed the conviction. Id. at 800.

Here, in contrast the government introduced evidence that Drummond Bank was insured both when it was first chartered in 1990 and in 2016, as well as testimony indicating that the bank's FDIC certificate was not subject to periodic renewal. Petitioner's argument thus amounts to his disagreement with the court of appeals' evaluation of the sufficiency of the evidence of FDIC-insured status in this particular case. But that factbound, case-specific determination does not warrant this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

2. Petitioner separately contends (Pet. 10-14) that forging the signature of another on a document does not constitute "use[]" of that person's name within the meaning of 18 U.S.C. 1028A(a)(1). That contention lacks merit and does not warrant further review.

a. Section 1028A(a)(1) requires a consecutive two-year term of imprisonment for any person who, "during and in relation to any felony violation enumerated in [Section 1028A(c)], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1); see 18 U.S.C. 1028A(b). Here, petitioner did "not dispute that he

'knowingly' signed Morris's name to [a] contract"; that Morris's name and signature on the forged contract constituted "a means of identification of another person"; and that his conduct occurred "'during and in relation to'" one of the felonies enumerated in Section 1028A(c) -- specifically, making false statements on a loan application, in violation of 18 U.S.C. 1014. Pet. App. A11-A12. In addition, petitioner "admit[ted] that he signed Morris's name 'without lawful authority.'" Id. at A12 (quoting 18 U.S.C. 1028A(a)(1)). Petitioner disputed only whether he "'use[d]' Morris's identification," contending that he had not done so "because he only signed Morris's name, and didn't try to impersonate Morris or otherwise act on his behalf." Ibid. The court of appeals correctly rejected that contention. Id. at A12-A16.

Nothing in Section 1028A(a)(1)'s text or context confines the term "uses" to stealing or assuming an identity. See Pet. App. A12-A16; accord United States v. Michael, 882 F.3d 624, 626-627 (6th Cir. 2018); United States v. Gatwas, 910 F.3d 362, 365 (8th Cir. 2018) (citing cases), cert. denied, 140 S. Ct. 149 (2019). The most natural reading of "to 'use' an object" is "'[t]o convert [it] to one's service,'" "'to avail oneself of [it],'" or "'to employ [it].'" Pet. App. A12-A13 (citation omitted; brackets in original); see also Michael, 882 F.3d at 626 (same). That ordinary meaning of "use" is not limited to theft or impersonation of another person's identity. See Pet. App. A13; accord Michael,

882 F.3d at 626-627; Gatwas, 910 F.3d at 365-366. In any event, whatever the precise scope of "use," the term readily encompasses petitioner's conduct in this case: affixing the name and forged signature of another to a fake contract to support a loan application, all undisputedly contrary to law.

b. Petitioner's contrary contentions lack merit.

Petitioner contends (Pet. 12-13) that he "did not take anything from Morris," "obligate Morris to do anything," or cause "damage[]" to Morris's credit. But, as the court of appeals correctly noted, "harm to the identity's true owner isn't an element of § 1028A(a)(1)." Pet. App. A16. Petitioner acknowledges as much in this Court, noting (Pet. 12) that "it is well settled that actual harm need not be suffered by a victim of Aggravated Identity Theft."

Petitioner additionally asserts (Pet. 12) that his use of Morris's name was "incidental" to the fraud because, according to him, Drummond Bank "did not rely upon the signature in extending the loan." Pet. i; see also Pet. 9. Petitioner does not identify any record evidence to support the factual premise of that assertion. In any event, even assuming that petitioner's assertion were factually correct, it lacks merit. This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." Bates v. United States, 522 U.S. 23, 29 (1997); see, e.g., Brogan v. United States, 522 U.S. 398, 406 (1998); United States v. Wells, 519 U.S. 482, 490-493 (1997).

Petitioner identifies no basis in the text, structure, or history of 18 U.S.C. 1028A(a)(1) supporting the imposition of an atextual reliance requirement of the sort he urges, and the court of appeals correctly rejected it. See Pet. App. A16.

c. Petitioner suggests (Pet. 10-12) that the decision below conflicts with the decisions of the First and Sixth Circuits interpreting the scope of the term "us[ing]" in 18 U.S.C. 1028A(a)(1). That assertion lacks merit. The courts of appeals broadly agree on the conduct covered by that phrase. To the extent that any tension exists in the language of courts of appeals' opinions, it is not implicated in this case.

Courts of appeals, including the First and Sixth Circuits, have "universally rejected th[e] argument" that Section 1028A(a)(1) "require[s] actual theft or misappropriation of the means of identification." United States v. Osuna-Alvarez, 788 F.3d 1183, 1185 (9th Cir.) (per curiam), cert. denied, 136 S. Ct. 283 (2015); see United States v. Lumbard, 706 F.3d 716, 721-725 (6th Cir. 2013); United States v. Ozuna-Cabrera, 663 F.3d 496, 498-501 (1st Cir. 2011), cert. denied, 566 U.S. 950 (2012); see also United States v. Etenyi, 720 Fed. Appx. 445, 454-455 (10th Cir. 2017); United States v. Mahmood, 820 F.3d 177, 187-188 (5th Cir.), cert. denied, 137 S. Ct. 122 (2016); United States v. Zitron, 810 F.3d 1253, 1260 (11th Cir. 2016) (per curiam); United States v. Otuya, 720 F.3d 183, 189 (4th Cir. 2013), cert. denied, 571 U.S. 1205 (2014); United States v. Reynolds, 710 F.3d 434, 436

(D.C. Cir. 2013); United States v. Retana, 641 F.3d 272, 274-275 (8th Cir. 2011). "Numerous prior decisions have upheld § 1028A(a)(1) convictions where the defendant neither stole nor assumed the identity of the other person." Gatwas, 910 F.3d at 365. Petitioner does not identify any court of appeals that has adopted his narrow interpretation of the term "use[]" in Section 1028A(a)(1) to encompass only theft of or assuming another person's identity. Multiple courts have expressly rejected it. See id. at 365-366; Michael, 882 F.3d at 626-629.

Petitioner errs in contending (Pet. 10-11) that the decision below is inconsistent with decisions of the First and Sixth Circuits. Petitioner cites (ibid.) United States v. Berroa, 856 F.3d 141 (1st Cir.), cert. denied, 138 S. Ct. 488 (2017), which found that the mere fact that defendants had fraudulently obtained licenses for medical practice, and thus were not validly licensed to issue prescriptions, did not mean that they committed aggravated identity theft in violation of Section 1028A(a)(1) by listing their actual patients' names on the prescriptions they issued to those patients. See id. at 155-157. In so doing, the court of appeals stated that it "read the term 'use' to require that the defendant attempt to pass him or herself off as another person or purport to take some other action on another person's behalf." Id. at 156-157. Here, however, by submitting a fraudulent contract that bore Morris's forged signature, petitioner plainly "purport[ed] to take * * * action on [Morris's] behalf" -- i.e., feign Morris's

assent to a contract -- which would satisfy the First Circuit's formulation in Berroa. Ibid.

As the First Circuit's post-Berroa decision in United States v. Tull-Abreu, 921 F.3d 294 (2019), cert. denied, No. 19-5975 (Oct. 15, 2019), makes clear, decisions of other circuits that have "'uph[eld] § 1028A(a)(1) convictions where the defendant neither stole nor assumed the identity of the other person'" are "[i]n accord with Berroa." Id. at 300 n.3 (quoting Gatwas, 910 F.3d at 365 and citing United States v. White, 846 F.3d 170, 177 (6th Cir.), cert. denied, 137 S. Ct. 2203 (2017), and Reynolds, 710 F.3d at 435-436). In Tull-Abreu, the First Circuit found that the defendant, a doctor, had "'purported to take some other action on another person's behalf,' as set forth in Berroa," by filing fraudulent claims for Medicare reimbursement that listed his patients' identifying information, even though he did not steal that information or assume his patients' identities. 912 F.3d at 300 (brackets omitted). In asserting that the even more direct conduct of forging a signature on a contract is not "use," petitioner thus urges a more restrictive meaning of the term "uses" than the First Circuit articulated in Berroa, as further clarified in Tull-Abreu.

Petitioner also cites (Pet. 11) the Sixth Circuit's decision in United States v. Miller, 734 F.3d 530 (2013), which construed the term "uses" not to reach the conduct of a defendant who had lied about what two individuals had done in securing a loan from

a bank. But as petitioner acknowledges (Pet. 12), the Sixth Circuit has since clarified in its subsequent decision in United States v. Michael, supra, that it construes Section 1028A(a)(1) to encompass conduct by defendants who use a means of identification "to further or facilitate the [enumerated felony]." Michael, 882 F.3d at 628. Michael specifically rejected reading Section 1028A(a)(1) to require that a defendant "impersonate someone else" or "assume[] another's identity." Id. at 628-629. Indeed, the Sixth Circuit explained that Miller "support[ed] th[e] interpretation" that it adopted in Michael. Id. at 627.[3]

d. Even if the question presented otherwise warranted further review, this case would be an unsuitable vehicle to address it. Whatever the precise outer limits of the phrase "uses * * * [the] means of identification of another person" in 18 U.S.C. 1028A(a)(1), petitioner's forging of Morris's signature on a fake contract to support a loan application falls comfortably within its scope. Further review is unwarranted.

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[3] The decision below also does not conflict with United States v. Hong, 938 F.3d 1040 (9th Cir. 2019), which was decided after the petition for a writ of certiorari was filed. In Hong, the defendant "provided massage services to patients to treat their pain," but then "participated in a scheme where that treatment was misrepresented as a Medicare-eligible physical therapy service." Id. at 1051. The Ninth Circuit found that the defendant's inclusion of the patients' information in the benefits claims he submitted did not satisfy 18 U.S.C. 1028A. 938 F.3d at 1050. As noted above, petitioner in this case did not merely include Morris's name as part of a fraudulent submission; he forged Morris's signature, thus purporting to assent to the contract on Morris's behalf.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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